Through all these cases it has been said that "the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission". Is it less administrative in its character when damages are being sought for a failure to abide by a purely railroad-made rule which had not been filed? Allowing such recovery is doing one of two things. It is either allowing a State court to determine what is a proper rule without the previous judgment of the Commission, or it is saying that the mere fact that a railroad has a schedule is proof that such schedule is non-discriminatory. The former is certainly against the principle laid down in the Abilene, Robinson and Pitcairn cases. The latter, in view of the later finding by the Commission that the rule was of itself discriminatory, seems unwise to say the least.

One is tempted to believe that the court may have been influenced by Mr. Justice Pitney's dissent in the Morrisdale case [18] and in two other cases decided at that same time.[19] His idea was that these three decisions were unnecessarily eliminating the force of Section Nine of the Act which allowed the United States courts jurisdiction. He argued that the opinion in the Abilene case is logical: That where it is a question of laying out schedules for *future* observance it is entirely proper to make the ruling of the Commission supreme and to deny to any court the right to say that such is unreasonable or discriminatory. "But to so apply that reasoning as to make it support the contention that discriminations by the carrier in the *past,* amounting to a *departure by the carrier from the established schedule* . . . and where the conduct of the carrier has no *prima facie* sanction under the law by reason of the filing and publishing of a schedule or otherwise, shall not be actionable in the ordinary course of law without previous investigation or determination by the Commission is not only to ignore the essential differences between the facts in this case [20] and those in the Abilene case, but is to *virtually eliminate Section Nine of the Interstate Commerce Act.* . . ."[21] It is suggested that this language may have had some bearing on the present decisions.

H. I.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—WEBB-KENYON ACT—The history of the development, both by judicial decision and by legislation, of the States' power to control the sale of liquor

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[18] 230 U. S. at page 267.

[19] Penna. R. R. Co. v. International Coal Co., 230 U. S. 184 (1913); Mitchell Coal & Coke Co. v. Penna. R. R. Co., 230 U. S. 247 (1913).

[20] Mitchell Coal Co. Case, *supra,* note 19; Morrisdale Coal Co. Case, *supra,* note 13.

[21] 230 U. S. at page 296.

within their own borders, is of particular interest at present owing to the almost universal agitation of the prohibition question.

In the License Cases [1] the Supreme Court of the United States held that the sale of intoxicating liquor which was a part of interstate commerce might be prohibited by a State even in the absence of a federal law. But this decision was overruled in *Leisy* v. *Hardin*,[2] which decided that the interstate shipment of liquor was a matter of national concern and that the States could not regulate it. In this decision the Supreme Court invoked the doctrine of *Cooley* v. *Port Wardens of Philadelphia*,[3] and also the doctrine of the silence of Congress, saying that as Congress had not broken its silence this showed clearly that the will of Congress was that the subject should be left unregulated by the States in this, a matter of national concern. The next step was the passage of the Wilson Act,[4] which provided in substance that the States might forbid the sale of liquor imported from other States in the original package, thus doing away with the result of *Leisy* v. *Hardin*. This act was held constitutional in *In re Rahrer* [5] on the ground that Congress had broken its silence, thereby giving the States power to pass laws forbidding the sale in the original package. There are also passages in the opinion which seem to stand for the proposition that Congress may determine when interstate commerce shall begin and end, or in other words to define interstate commerce. Mr. Chief Justice Fuller said:[5a] "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." The latest step was the passage of the Webb-Kenyon Act,[6] which substantially prohibits the shipment or transportation of liquor from one State to another when it is to be received or possessed or in any manner used in violation of State laws. This apparently removes the last obstacle to absolute State control of the liquor question as there is now no difference, as far as State regulation goes, between liquor manufactured within the State and that brought in in interstate commerce; it has always been admitted that a State under its police power could forbid the manufacture or sale of liquor made within its borders.[7]

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[1] 5 How. 504 (1847).

[2] 135 U. S. 100 (1889).

[3] 12 How. 299 (1851): "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

[4] Act Aug. 8, 1890, c. 728; 26 Stat. 313; U. S. Comp. St. 1901, page 3177.

[5] 140 U. S. 545 (1891).

[5a] At page 562.

[6] Act March 1, 1913, c. 90; 37 Stat. 699; U. S. Comp. St. 1913, §8739.

[7] Mugler v. Kansas, 123 U. S. 623 (1887).

Although there is no decision of the Supreme Court on the constitutionality of this act there have been several decisions of lower courts advancing different theories to support it. In this connection the recent case of *State of West Virginia* v. *Adams Express Company*[8] is of interest in that the Circuit Court of Appeals of the Fourth Circuit decided in favor of the constitutionality of the act. The attack made on it was that it was an attempt by Congress to confer on the States the power to regulate interstate commerce and therefore unconstitutional. The Circuit Court, however, took the position that since Congress has power to outlaw and exclude absolutely from interstate commerce liquor or any other deleterious substance, it also has the power to exclude them conditionally, the condition being that if the particular State has prohibited the sale of liquor within its borders the Act of Congress will operate. From analogy to the lottery, white slave and pure food laws[9] it is a fair inference that Congress could pass an act absolutely prohibiting the interstate shipment of liquor, but it is submitted that to prohibit such shipment on the condition stated is in fact a delegation by Congress of the right to regulate interstate commerce.

Another interesting argument is that advanced by the court of last resort of Delaware,[10] which is based on the presumption that *In re Rahrer* decided that Congress had the power to define interstate commerce, as was undoubtedly intimated in that case. The Delaware court holds that if Congress can allow the States to forbid the sale of liquor in the original package why should it not take the extra step and declare, as it did in the Webb-Kenyon Act, that no liquor may be shipped into a State contrary to the laws of that State? In other words, the sale of liquor in the original package is just as much a part of interstate commerce as its transportation, and if Congress can divest the former of its interstate commerce character, why should it not be able to do the same with respect to the latter? This argument is striking, but the fallacy is that the power of Congress to regulate does not include the power to define. What interstate commerce is, is not a question for Congress but for the Supreme Court of the United States, to decide. If it is true that Congress can decide the question it is hard to perceive what, if any, limitations there are on Congress as far as the power to regulate interstate commerce is concerned.

It is clear that if Congress should pass an act providing that a railroad running from New York City to Trenton, New Jersey, should not be construed as an interstate carrier, this would be unconstitutional because it is not a question which Congress is competent

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[8] 219 Fed. Rep. 794 (1915).

[9] The constitutionality of these acts are discussed in: Lottery Cases, 188 U. S. 321 (1902); Hoke v. U. S., 227 U. S. 308 (1912); Hipolete Egg Co. v. U. S., 220 U. S. 45 (1910).

[10] State v. Grier, 88 Atl. Rep. 579 (Del. 1913).

to decide. But the Supreme Court would have to decide whether or not, under the Commerce Clause this is constitutional. Thus when the Supreme Court has decided as it did in *Brown* v. *Maryland* [11] that interstate commerce does not end till after the sale in the original package, how can Congress override this express exposition of the Constitution by defining that interstate commerce shall end at an earlier period, or in other words, say what is and what is not interstate commerce? If this be true what is the function of the judiciary?

Therefore it would seem that the doctrine of the silence of Congress, which has been severely criticized as an unjustifiable rule with no real basis in fact, is the only ground on which the Webb-Kenyon Act can be upheld: That as the matter is one of national concern the silence of Congress before the passage of the Wilson Act meant that Congress wanted the subject left unregulated. The Wilson Act broke the silence of Congress and allowed the States a certain amount of regulation. By the Webb-Kenyon Act Congress has again broken its silence and allowed the States absolute control. The reason why this is not a delegation of power is that the silence of Congress placed a bar on State action and therefore, although the States always had the innate power to act they could not do so till Congress lifted the bar. In other words, this is not a delegation of new power to the States but a lifting of the barrier which prevented the exercise of a power which the States always had.

But if the doctrine of the silence of Congress be sound, the prohibition on a State's power to regulate interstate commerce in a matter of national concern does not reside in the Constitution *ipso facto,* but only when Congress by its silence shows that it wants the subject left unregulated. It is difficult to believe that the framers of the Constitution could have intended that the right of the States to so regulate could be dependent on the action or non-action of Congress. However this is a well recognized doctrine.

In any event it will be of the greatest interest to see how the Supreme Court will decide this question, because its decision will go a long way toward determining whether the power to regulate interstate commerce is exclusively in Congress, or concurrent between that body and the States,—a question which has been agitated since the adoption of the Constitution.

J. W. L.

DEEDS—RELEASE OR COVENANT NOT TO SUE—Those whose delight is in giving effect to what they would persons had said, rather than to what persons actually found it convenient to say, will herald as the attainment of their ideal the decision of *Dwy* v. *Connecticut Company,* in which the words "remise, release and dis-

[11] 12 Wheat. 419 (1827).